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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. 79-5411

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LELAND SAMMONS,

Appellant

vs.

STATE OF OHIO,

Appellee

ANSWER OF APPELLEE TO APPELLANT'S
MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respectfully submitted,

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ANSWER OF APPELLEE
TO APPELLANT'S MOTION
FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, in attempting to proceed in forma pauperis, requests the United States Supreme Court to accept the appeal from the Supreme Court of Ohio.

Title 28 U.S.C.A. 1915, governs the proceedings in forma pauperis. This ordinance states in part that a person "makes an affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress". The affidavit should state however, with some particularity, the financial basis upon which a claim of poverty exists. In the affidavit filed by Appellant reference is made to his "modest income". The amount of income should be mentioned, since such is relevant to whether poverty exists. Also, the appeal involves Endangering Children. Three of Appellant's children are the subject of the criminal charge, and there is no mention these children reside with Appellant.

For these reasons, the Motion to Proceed in forma pauperis should not be allowed.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of Appellee's Answer to Appellant's Motion for Leave to Proceed in forma pauperis was delivered to Joseph C. Merling, Counsel for Appellant Public Defender Division, Legal Aid Society, 308-A Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio, 45202, on this 5th day of December, 1979.

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STATE OF OHIO,

Appellee

ANSWER OF APPELLEE TO APPELLANT'S APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

Respectfully submitted,

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OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 58 Ohio St. 2nd 460, 391 N.E. 2d 713, and is set forth as Appendix A. The opinion of the Court of Appeals for the First Appellate District of Ohio is unreported, and is attached as Appendix B.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute involved herein is the child Endangering statute found in Pages OHIO REVISED CODE ANN., Title 29 Section 2919.22 (A), p. 110 (1975). The statute reads as follows:

> (A) No persons, being the parent, guardian, person having custody or control, or person in loco parentis of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(See Appendix C for complete copy of statute)

The Constitutional provision involved is the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

(See Appendix C for complete copy)

## CONSTITUTIONAL QUESTION PRESENTED

Whether the phrase "duty of care" fails to give fair noti of forbidden conduct and fails to provide standards to police officers and judges, thereby rendering Ohio Revised Code Section 2919.22 (A) unconstitutional under the Due Process clause of the Fourteenth Amendment.

## STATEMENT OF THE CASE

On August 9, 1977, Appellant's wife punished their three children for spilling water in the kitchen. The punishment being the application of scissors, heated with matches, to the buttocks of the three children. The Appellant, asleep in the same room, awoke after the first child was branded, and asked what was burning. The Appellant, learning what punishment was being given his children, admonished his wife not to continue, then he began laughing. He watched while two other children were branded, and did nothing further to restrain his wife. No medical attention for the three children, ages nine, ten and eleven, was sought until two days later.

Based upon these facts, the Appellant was charged with violating O.R.C. 2919.22 (A), Endangering Children, by creating a "substantial risk to the health" of each child, by violating a "duty of care". A Motion to Dismiss, based upon the vagueness and the overbreadth of O.R.C. 2919.22 (A), was heard and overruled by the trial court. A four day jury trial on November 15, 16, 17 and 18, 1977, resulted in a verdict of guilty as to all three charges. The Appellant was sentenced on November 28, 1977, to three consecutive terms of 180 days each.

A timely Notice of Appeal was filed with the First District Court of Appeals for Ohio raising the issues of vagueness and overbreadth of O.R.C. 2919.22 (A) as error. The Court of Appeals upheld the lower court's decision, (Appendix p. 14 ), relying on State v. Smith, C-77473, decided May 24, 1978, unreported, (Appendix p. 24). However, due to a conflict with State v. Bruns, Case No. 5-265, decided April 18, 1978, by the Eleventh District Court of Appeals for Ohio, (Appendix p. 20), the First District Court of Appeals certified the case to the Ohio Supreme Court.

The Ohio Supreme Court held the overbreadth issue was not raised upon the appeal, but also held O.R.C. 2919.22 (A) was not void-for-vagueness under the United States Constitution. (Appendix p. 10). From this decision, the present appeal arises.

NO SUBSTANTIAL FEDERAL QUESTION

A statute, punitive in nature, must set forth an ascertainable standard of conduct, which gives an individual notice of what conduct is proscribed. Absence of an ascertainable standard, results in vagueness, which contravenes the Due Process Clause of the Fourteenth Admendment of the United States Constitution. Appellant claims Ohio's Child Endangering statutes, O.R.C. 2919.22 (A), is vague because "duty of care" does not set forth an ascertainable standard of conduct for Appellant to conform.

The United States Supreme Court on numerous occasions addressed the vagueness issue as it pertains to statutory construction. From prior decisions, specific guidelines have been formulated, which require a statute to:

1). Set forth "ascertainable standards of guilt", Winters v. New York, 333 U.S. 507, 515, 92 L. Ed. 840, 68 S. Ct. 665 (1948);

2). be sufficiently clear enough to inform an individual of what conduct would subject he or she to a penalty, Connally v. General Construction Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926); and

3). not be subject to several meanings whereby selective law enforcement may result. Smith v. Goguen, 415 U.S. 566, 574, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974).

If O.R.C. 2919.22 (A) complies with these guidelines, the statute is neither vague nor contrary to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

O.R.C. 2919.22 (A) governs conduct between children, handicapped persons under 21 years; and parents, guardians, and other persons in "loco parentis". The statute does not have any potential of placing a "chilling affect" on a First Amendment freedoms. Consequently, an evaluation of O.R.C. 2919.22, in light of the above guidelines, requires less precise language than a statute which might impinge on constitutionally protected conduct. Graynard v. City of Rockford, 408 U.S. 104, 109, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). Cf. United States v. National Dairy Products Corp., 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963) (matters of purely economic nature); and Parker v. Levy, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974), (statutes under the Uniform Code of Military Justice).

The Appellant argues that due to varying economic conditions of people, their work, and values, numerous attitudes evolve resulting in diverse methods used to raise a child. And the appellant argues because of these varying attitudes, the language "duty of care" contained in O.R.C. 2919.22 (A), does not set forth any ascertainable standard, when no element of scienter is present. Such an argument ignores the language contained within O.R.C. 2919.22 (A), previous statues and case law, and the conduct charged against the Appellant.

The words "duty of care" cannot be placed in a vacuum and an automatic decision made. Instead the standard must be placed within the context of the entire section. As indicated, the statute is entitled "Endangering children". Webster's New Collegiate Dictionary defines endanger "to bring in danger or peril". Danger is also defined as "exposure or liability to injury, pain, or loss. The words "health and safety" are contained in the statute. These words have sufficient connotation and common meaning as to convey to any individual what "duty of care" is contemplated. Finally, the standard or "duty of care" contemplated, can be gleaned by words association. The conduct contemplated is placed with other nouns; support and protection. And when read together, guidance is provided as to what standard of conduct is required.

There exists an abundance of law and case law con-

struing and defining the existing relationship between parent and child. In Ohio, there are separate sections both covering the conduct of children and parents in domestic relations law and juvenile law. And as indicated in the committee comments, the drafter's intention was to punish a breach of a statutory duty when the breach results in a substantial risk to the health or safety of a child. To ignore all previous case law and statutes and say the standard "duty of care, protection, or support" is vague, implies one lives in a vacuum, void of the benefit of common knowledge. Instead, void for vagueness simply means that a statute must set forth conduct which one could reasonably understand conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954). And regardless of Appellant's economic status, the branding of children is conduct one could "reasonably understand" would endanger a child's health and safety.

In United States v. United Dairy Corp., (supra), the United States Supreme Court held, that the sufficiency of statutory notice "must of necessity be examined in light of the conduct with which a defendant is charged". 372 U.S. 29, 33, 9 L. Ed. 2d 561, 83 S. Ct. 594 The Appellant herein, was charged with condoning the branding of his children with heated scissors; and with failure, after the branding occurred, to take necessary steps to procure proper medical treatment. Regardless of one's economic situation, to permit the branding of a child and the failure thereafter to seek medical attention is a clear violation of a "duty of care" a parent owes a child. And to claim absence of knowledge of proscribed conduct, when the conduct is clearly proscribed, should not be used as a means to circumvent responsibility for criminal conduct.

The Appellant claims the words "duty of care" are vague and in violation of the Due Process Clause. However, O.R.C. 2919.22 (A) does set forth an ascertainable standard, which is not subject to several meanings. Therefore, the appeal does not raise a substantial federal question, and should not be accepted.

Respectfully submitted,

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APPENDIX A

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*See, also, Section 207.13 of the Model Penal Code (Tent. Draft No. 9), now Section 230.4, which is substantially analogous to R. C. 2919.22(A). The Comments to that section, at page 183, indicate that the offense "* * * can be committed only by an act or omission in violation of legal duty."

THE STATE OF OHIO, APPELLEE, *v.* SAMMONS, APPELLANT.

[Cite as State v. Sammons (1979), 58 Ohio St. 2d .]

*Criminal law—Endangering children—R. C. 2919.22(A)—Constitutionality.*

1. R. C. 2919.22(A) which prohibits a parent or guardian of a child under the age of 18 years from creating a substantial risk to the health or safety of a child by violating a duty of care, protection or support is not unconstitutionally vague or indefinite.
2. R. C. 2919.22(A) provides fair notice that the contemplated conduct is forbidden and proscribes conduct that by any reasonable modern standard of our society is unacceptable.

(No. 78-1431—Decided June 27, 1979.)

CERTIFIED by the Court of Appeals for Hamilton County.

Leland Sammons, appellant herein, was charged in the Hamilton County Municipal Court with three violations of R. C. 2919.22(A), endangering children. At his trial, it was adduced that on August 9, 1977, appellant's wife "disciplined" three of their sons, aged nine, ten and eleven, by applying heated scissors to their backsides. Appellant was asleep in the same room at the time, but apparently was awakened by the noises of the second child being harmed.

According to the children's testimony, appellant asked his wife what was burning, and when he discovered what she was doing, he told her to stop, but then began laughing. Appellant's wife then branded the third child while appellant looked on, taking no action to restrain her.

Appellant and his wife did nothing to care for the burns until the children complained of pain several days later. At that time, an unspecified ointment was applied to the burns.

Only after the boys had run away from home and had been found by police were their burns treated by a physician. One of the examining physicians testified that each of the boys had sustained "moderately severe" burns which had penetrated all three layers of the skin. The other physician testified that, in his opinion, the burns required immediate medical attention for the risk of infection was substantial.

A jury found appellant guilty as charged and judgment was entered upon the verdicts. Appellant appealed the judgment, contending, *inter alia*, that R. C. 2919.22(A) is unconstitutionally vague and overbroad. The Court of Appeals rejected his contention and affirmed the judgment.

The Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals for Lake County in *State* v. *Bruno* (No. 5-265, April 18, 1977), unreported, certified the record of the case to this court for review and final determination.

*Mr. Thomas A. Luebbers*, city solicitor, *Mr. Paul J. Gorman* and *Mr. Frank H. Prouty, Jr.*, for appellee.

*Mr. Richard C. Gasen* and *Mr. Joseph C. Merling*, for appellant.

HOLMES, J. Appellant attacks the constitutionality of R. C. 2919.22(A) asserting that it is void for vagueness and overbreadth under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, the argument propounded by appellant ignores the question of overbreadth. The sole issue before this court, therefore, is whether the statute is sufficiently definite to satisfy the requirements of due process of law.

R. C. 2919.22 provides, in pertinent part, that:

"(A) No person, being the parent * * * of a child under eighteen * * * shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. * * *

"* * *

"(C) Whoever violates this section is guilty of endangering children, a misdemeanor of the first degree. * * *"

Appellant contends that the phrases "substantial risk" and "duty of care, [protection, or support]" render the statute so indefinite "* * * that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." *Columbus* v. *Thompson* (1971), 25 Ohio St. 2d 26, 30, quoting *Connally* v. *General Construction Co.* (1926), 269 U. S. 385, 391. We disagree.

The constitutional infirmities of vague penal statutes are three-fold. Indefinite statutes fail to provide fair notice that the contemplated conduct is forbidden. *United States* v. *Harriss* (1954), 347 U. S. 612, 617. Such statutes also fail to set reasonably clear guidelines for those charged with their administration, resulting in arbitrary and unequal enforcement. *Smith* v. *Goguen* (1974), 415 U. S. 566, 572-73. Additionally, vague criminal statutes often proscribe conduct that, by modern standards, is normally innocent. *Papachristou* v. *Jacksonville* (1972), 405 U. S. 156, 163. None of these defects is apparent in R. C. 2919.22 (A), as applied to appellant.

Appellant claims that the phrase "duty of care, [protection, or support]" is fatally indefinite. He asserts that "* * * there is no innate, uniform parental duty to which all parents subscribe * * *."

In advancing this premise appellant sets forth that "[s]tudies have demonstrated that working class (*i. e.*, blue collar) parents tend to emphasize conformity to external standards of orderliness, obedience, and respect for

adults, and are more likely to rely on the use of physical force as a means of punishment. In contrast middle class (*i. e.*, white collar) parents tend to emphasize self-direction, individualism, and realization of potential, and are more likely to rely on verbal interaction in response to persistent misbehavior."

The foregoing discussion as advanced by appellant in support of the claimed vagueness of this statute is of little weight in applying what may be considered to be a reasonable standard of duty of care and protection of one's children generally to be applied throughout the community.

Whatever the color of the collar, a generally acceptable standard of societal attention to the needs and care of our offspring is not difficult of either determination or application. The norm in our society is for a parent to strive to see that his children are reasonably well nourished, housed, and clothed and reasonably protected from harm, and provided with necessary health care.

Certainly, to stand by and do nothing to prevent the torturous branding of one's children, and then continue to stand by and do nothing to see that the wounds inflicted are properly medically treated, meets no standard, however abysmally low.

In any event, the phrase attacked as indefinite does not exist in a legal vacuum. There is an abundance of statutory law, construed by the courts, which defines a parent's duties under the law. As used in R. C. 2919.22(A), the phrase "duty of care, protection, or support" was intended by the General Assembly to embrace only those duties of a parent toward his child as are imposed by law.

The Committee Comment to R. C. 2919.22(A) implies as much, when it states that:

"* * * Nonsupport as such is cognizable under section 2919.21 of the Revised Code, but if the failure to support a child results, for example, in the child suffering from malnutrition or exposure, it is an offense under this section."

The Committee Comment makes apparent the intention of the drafters of this section. That intention was to punish a breach of a statutory duty, when the breach results in a substantial risk to the health or safety of a child.

Appellant argues further that the phrase "substantial risk" is unconstitutionally vague. This phrase is defined in R. C. 2901.01(H) as "* * * a strong possibility * * * that a certain result may occur or that certain circumstances may exist." Appellant urges that "[m]aking a possibility however strong, the basis for criminal conduct, creates a standard that can only be guessed at and never anticipated."

We believe that appellant had adequate notice of the standard of conduct imposed by statute. A man of "common intelligence" would know that appellant's conduct presented a strong possibility of harm to the health or safety of appellant's children. There exist "* * * limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent upon finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with * * *." *United States Civ. Service Comm. v. National Assn. of Letter Carriers* (1973), 413 U. S. 548, 578-79.

R. C. 2919.22(A) which prohibits a parent or guardian of a child under the age of 18 years from creating a substantial risk to the health or safety of a child by violating a duty of care, protection or support is not unconstitutionally vague or indefinite,

R. C. 2919.22(A) provides fair notice that the contemplated conduct is forbidden and proscribes conduct that by any reasonable modern standard of our society is unacceptable.

We find none of the alleged constitutional infirmities to be present in R. C. 2919.22(A), as that statute applies to appellant. Although it would have been more appropriate to have charged appellant with complicity in the violation of R. C. 2919.22(B), proscribing the torture or cruel abuse of a child, appellant was properly charged with and convicted under R. C. 2919.22(A). The judgment of the Court of Appeals is hereby affirmed.

*Judgment affirmed.*

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

Motion Affirmed Judged

APPENDIX B

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | NO. C-77824 |
| Plaintiff-Appellee, | : | |
| vs. | : | DECISION. |
| LELAND SAMMONS, | : | FILED COURT OF APPEALS |
| Defendant-Appellant. | : | SEP 20 1978 |
| | | CLERK OF COURTS |

Messrs. Thomas A. Luebbers, Paul J. Gorman and William R. Martin, Room 200-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Richard C. Gasen, Public Defender Division, Room 308-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Municipal Court, the transcript of proceedings, the assignments of error, briefs, and the arguments of counsel.

The defendant-appellant was charged with violation of R. C. 2919.22(A), endangering children, and entered his plea of not guilty thereto. Following the overruling of motions to dismiss and to suppress certain physical evidence, the defendant was convicted after trial by jury and was sentenced as appears of record. Appeal was timely filed with three assignments of error presented for review.

The first assignment of error challenges the overruling of defendant's pre-trial motion to dismiss based upon the asserted unconstitutionality of R. C. 2919.22(A) under the Fourteenth Amendment. Having previously determined that the statute is neither impermissibly vague nor overbroad, we overrule the assignment of error on authority of *State v. Smith*, No. C-77473, May 24, 1978, 1st Dist. Ct. of App.

The second assignment of error is addressed to the overruling of defendant's motion to suppress. The defendant argues that a consent to search the domiciliary apartment given to the police by his wife, during the course of which certain photographs were taken and subsequently introduced into evidence, was ineffective because it was given under circumstances amounting to coercion and negativing any voluntary or intelligent waiver of rights. The transcript of the pre-trial hearing on the motion to suppress reveals that the police officers found Mrs. Sammons at her mother's residence several doors away from the apartment in question, that she was placed under arrest and informed of the nature of the charge, that she appeared to the officers to be normal, not under the influence of drugs, and to be cooperative. After her consent to search the apartment was orally given to the police, a relative of Mrs. Sammons accompanied the officers to the apartment, where the photographs in question were taken.

The defendant argues that because the wife had been placed under arrest[1] and was therefore in technical custody, the prosecution failed in its burden of establishing the requisite absence

of coercion in obtaining the consent to search, citing *Judd v. U. S.* (1951), 190 F.2d 649 and *Bumper v. North Carolina* (1968), 391 U.S. 543. We disagree. Nothing in the record of this cause has been discovered to warrant a conclusion that such an aura of coercion surrounded Mrs. Sammons as to necessitate a finding that her consent was neither willingly nor intelligently given. She was in her mother's home, not in jail or in a hostile environment, with her mother and brother, and in a cooperative and reasonable frame of mind. The scene, insofar as it is reflected in the record, was essentially non-confrontational and non-coercive. We do not believe we are required to hold that an arrest *per se* destroys the ability to give a valid consent to search; absent that, we conclude that the trial court had before it sufficient evidence to permit it to conclude that the state had satisfied its admitted burden of demonstrating that the consent was unequivocal and was freely and intelligently given. The second assignment of error is accordingly overruled.

We note, in passing, that the photographs in question were, at most, cumulative. As discussed more fully below, competent evidence of existence of all of the elements of the offense was present in this cause in sufficient -- and sufficiently conclusive -- fashion to have made any error in admitting the photographs into evidence non-prejudicial.

Finally, the defendant argues that the judgment was contrary to the manifest weight of the evidence because, he asserts, there was a failure to prove beyond a reasonable doubt that he "create[d] a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support." R. C. 2919.22(A). We disagree.

There was credible and probative evidence from which the triers of fact could have found that the defendant, asleep a few feet away, awoke after his wife had branded on the buttocks their first child; that he asked "what was burning?" when he awoke, and both saw and was informed that it was his child's flesh that was burning; that he rolled over in bed and laughed while his wife repeated the branding on their two other children; that the branding caused substantial burns on the children which could have (and did in one instance) become infected; and that the defendant did little or nothing to treat or to cause his children to be treated for these burns and trauma during the period the children were with him after the burning occurred. We find the third assignment of error to be meritless and overrule the same.

The judgment is affirmed.

PALMER, P. J., KEEFE and CASTLE, J. J.

1. Certain testimony given during the hearing may be interpreted as placing this issue in some question, but we assume for purposes of this decision that Mrs. Sammons had in fact been placed under arrest before her consent to search was secured.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

## APPENDIX C

§ 2919.22 Endangering children.

(A) No person, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen or a mentally or physically handicapped child under twenty-one:

(1) Torture or cruelly abuse the child;

(2) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(3) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(4) Entice, permit, encourage, compel, employ, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that is obscene, as defined in section 2907.01 of the Revised Code.

(C) Whoever violates this section is guilty of endangering children, a misdemeanor of the first degree. If violation of this section results in serious physical harm to the child involved, or if the offender has previously been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the fourth degree.

## AMENDMENT

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT

COUNTY OF [illegible]

COURT OF APPEALS CASE NO. [illegible]

STATE OF OHIO

Appellant

- vs -

MARVIN BRUNO

Appellee

ANNOUNCEMENT OF DECISION

DATED: April 18, 1977

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. submitted on briefs

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

The defendant-appellee herein was indicted by the Lake County Grand Jury on two counts of endangering children under O. R. C. 2919.22(A). The language of each count thereof was identical except for the names of the endangered children listed and for the date of the occurrence. That language in pertinent part was as follows:

> . . . being the person having custody or control of (name of child), a child under eighteen years of age, did create a substantial risk to the health or safety of such child by violating a duty of care, to-wit: maintenance of a fence and supervision over a pond located over the property of Marvin Bruno, and resulting in serious physical harm to (name of child), this constitutes a felony of the fourth degree, . . .

The defendant-appellee filed a motion to dismiss on the grounds that Section 2919.22(A) of the Revised Code under which this defendant is charged is unconstitutional in that it violates the due process clause of the Fourteenth Amendment of the United States Constitution. Section 2919.22(A) reads as follows.

> No person, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

The Common Pleas Court filed a judgment entry stating that

> . . . the Court finds that Section 2919.22(A), Revised Code of Ohio, is unconstitutional in that it is so vague on its face that men of normal intelligence would have to guess as to the meaning of the statute insofar as it applies to the indictment returned in this case.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the indictment be dismissed, . . . , and the defendant discharged . . ."

This Court has granted leave to appeal to the State. Her error, the State says the trial court erred in finding that Section 2919.22(A) of the Ohio Revised Code is unconstitutional in that it is so vague on its face that men of normal intelligence would have to guess as to its meaning. We disagree with the contention of the prosecution and agree with the trial court. Further, we concur with the statements contained in appellee's brief that the section complained of is so vague on its face that men of normal intelligence would have to guess at its meaning.

Appellee goes on to say:

> No man shall be held criminally responsible for conduct which he could not reasonable understand to be proscribed. United States v. Harriss (1954), 347 U.S. 612, at page 617.

The Supreme Court of Ohio in Columbus v. Thompson (1971), 25 Ohio St. 2d 2f, in citing Winters v. New York (1948), 333 U. S. 507, at page 515, held, "Basic to any penal enactment is the requirement that it be sufficiently clear in defining the activity prescribed, and that it contain 'ascertainable standards of guilt.'"

Both of these cases were cited in the most recent pronouncement of the Supreme Court, Columbus v. Rogers, (1975), 41 Ohio St. 2d 161, which involved a municipal ordinance making it unlawful for any person to appear in public in a dress not belonging to his or her sex. The syllabus reads as follows:

> 'A provision of a city ordinance making it unlawful for any person to appear in public 'in a dress not belonging to his or her sex,' considered in the light of contemporary dress habits, violates the due process clause of the Fourteenth Amendment to the United States Constitution in that it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'

The philosophy behind the vagueness cases is that the dividing line between what is lawful and unlawful cannot be left to conjecture. United States v. Capital Traction Company, 34 D.C. App. 592. The United States Supreme Court wrote in Connally v. General Construction Company, 269 U.S. 385, 70 L. Ed. 322 (1926) and has reaffirmed many times since then that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning violates the first essential of due process of law.

For the reasons indicated, the judgment of the trial court is affirmed.

COOK, P. J., and Dyke, J., concur.

EDWIN T. HOFSTETTER, JUDGE

NOTE: If a Journal Entry is not presented to this Court for signature within ten days from the filing date hereof, this Court will journalize this decision sua sponte (Rule 22D) and the time period for review will begin to run therefrom.

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | NO. C-77473 |
| Plaintiff-Appellee, | : | |
| vs. | : | D E C I S I O N. |
| LOIS FAYRENE SMITH, | : | FILED |
| Defendant-Appellant. | : | COURT OF APPEALS |
| | | MAY 24 1978 |
| | | CLERK OF COURTS |

Messrs. Thomas A. Luebbers, Paul J. Gorman and Frank H. Prouty, Jr., Room 200-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Peter Rosenwald, Room 308-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Municipal Court, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

The defendant-appellant was charged with a violation of R. C. 2919.22(A) (Endangering children).[1] Before trial, she moved for a dismissal of the charge on the ground that the statute was unconstitutional, renewing that motion when the prosecution rested and at the conclusion of all the evidence. The motion and its renewals having been overruled, the court found the defendant guilty as charged. It is from the judgment entered and sentenced imposed upon such finding that this appeal derives.

The first and second assignments of error raise a singular question, *viz.*, is the statute unconstitutional facially as being vague and overbroad and void for vagueness in its application upon the facts established in this case?

In deciding *State v. Rogers* (1975), 44 Ohio App. 2d 289, 337 N.E.2d 791, we addressed ourselves to the question of the constitutionality of R. C. 2919.22(B) which proscribed the administration of, *inter alia*, corporal punishment which was excessive or created a substantial risk of serious physical harm to the child.

The first headnote to *Rogers, supra*, is:

> R. C. 2919.22(B) is not unconstitutionally vague or overbroad and a person of ordinary sensibilities and intelligence should be capable of ascertaining its meaning and abiding by its proscriptions.

Applying the rationale by which we reached the result in *Rogers, supra*, to the paragraph of R. C. 2919.22 here involved, we have come to an identical conclusion with respect to constitutionality of the law.

Therefore, neither the first nor the second assignment is well taken.

The third assignment of error is that the finding and judgment is manifestly against the weight of the evidence. We find this assignment to be well taken.

Here, a five year old male child was found by a neighbor in a hallway of a two story, four family building. He was alone, crying, uninjured but "dirty." Police were summoned and they knocked repeatedly upon the door of the apartment occupied by the child's mother in an effort to locate her. The door was locked and they

aroused no response from within. Consequently, the child was taken to a place of refuge. He was retrieved by his mother when she appeared at a police station about an hour and a half later.

The accused when testifying in her own behalf claimed that she had taken medication for a stomach ailment, had fallen asleep and had not heard the knocking on her door.

After a comparison of all the evidence we find it to fall short of proof beyond a reasonable doubt that the accused had violated a duty of care, the record being devoid of adequate proof of the existence of special circumstances, conditions or factors giving rise to a substantial risk to the child's safety or welfare by being alone in the common hallway in an occupied, multi-family residence during the early hours of an afternoon.[2]

Since the finding is not based upon proof of the quantum required it is contrary to law and the accused is entitled to be discharged.

The judgment of the Hamilton County Municipal Court is reversed and the defendant-appellant, Lois Fayrene Smith, is discharged.

PALMER, P. J., SHANNON and KEEFE, J. J.

1. The statute as it then existed provided in pertinent part:

> No person being the parent . . . of a child under eighteen . . . shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support.

2. *Cf., State v. Kulig* (1974), 37 Ohio St. 2d 157, 309 N.E.2d 897, to the effect:

> Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

CERTIFICATION OF SERVICE

I hereby certify that a copy of Appellee's Answer to Appellant's Appeal from the Supreme Court of the State of Ohio was delivered to Joseph C. Merling, Counsel for Appellant Public Defender Division, Legal Aid Society, 308-A Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio, 45202, on this 5th day of December, 1979.

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